

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

TYRONE ROGERS,

Plaintiff,

v.

G.J. GIURBINO, et al,

Defendants.

CASE NO. 11cv560 WQH (RBB)

ORDER

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 145) issued by United States Magistrate Judge Ruben B. Brooks.

**I. Background**

On March 21, 2011, Plaintiff, a state prisoner proceeding *pro se*, initiated this case by filing a Complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). On April 20, 2011, United States District Judge Irma E. Gonzalez issued an Order sua sponte dismissing Plaintiff's Complaint for failure to state a claim. (ECF No. 3).

On May 31, 2011, Plaintiff filed a First Amended Complaint. (ECF No. 5). On June 7, 2016, Judge Gonzalez issued an Order sua sponte dismissing the First Amended Complaint for failure to state a claim. (ECF No. 7).

On July 12, 2011, Plaintiff filed a Second Amended Complaint. (ECF No. 8). On August 9, 2011, Judge Gonzalez issued an Order sua sponte dismissing Defendant Narvis from the litigation and dismissing Plaintiff's Eighth Amendment and access to courts claims. (ECF No. 9).

1 On October 31, 2011, Defendants G J Giurbino, P. Kuzil-Ruan, and Domingo  
2 Uribe, Jr. filed a motion to dismiss the Second Amended Complaint. (ECF No. 18).  
3 On February 14, 2012, Judge Gonzalez issued an Order granting the motion in part and  
4 denying the motion in part. (ECF No. 33). The Court granted the motion as to  
5 Plaintiff's claims under the First and Fourteenth Amendments, dismissed all claims  
6 against Defendants Giurbino and Uribe, and denied the motion to dismiss the claims  
7 under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§  
8 2000cc, *et seq.* ("RLUIPA").

9 On November 13, 2012, Defendant Kuzil-Ruan moved for summary judgment.  
10 (ECF No. 74). On February 26, 2013, Judge Gonzalez issued an Order granting  
11 summary judgment in favor of Defendant Kuzil-Ruan. (ECF No. 96).

12 On March 27, 2013, Plaintiff filed a notice of appeal. (ECF No. 100). On  
13 August 31, 2015, the United States Court of Appeals for the Ninth Circuit issued an  
14 Order affirming in part, reversing in part, vacating in part, and remanding for further  
15 proceedings. (ECF No. 112). The Court of Appeals affirmed the dismissal of  
16 Plaintiff's Eighth Amendment outdoor exercise claim and Plaintiff's access to courts  
17 claim. The Court of Appeals reversed the dismissal of Plaintiff's First Amendment  
18 claim. The Court of Appeals vacated the dismissal of claims against Defendants  
19 Giurbino and Uribe in their individual capacities, stating, "On remand, Rogers may  
20 request leave to amend his complaint regarding Giurbino and Uribe." *Id.* ¶ 5. The  
21 Court of Appeals reversed the grant of summary judgment as to Defendant Kuzil-Ruan  
22 on Plaintiff's RLUIPA claim for injunctive relief only. The Court of Appeals directed  
23 the district court on remand to address whether Defendants are entitled to qualified  
24 immunity and whether Plaintiff's claim for injunctive relief is moot. The Court of  
25 Appeals also ordered that "the district court should allow Rogers the benefit of its grant  
26 of his motion to compel discovery" on remand.

27 On January 19, 2016, Plaintiff filed the Third Amended Complaint ("TAC"),  
28 alleging claims against Defendants Giurbino, Uribe, and Kuzil-Ruan under the First

1 Amendment and RLUIPA. (ECF No. 128). On February 1, 2016, Defendants Giurbino  
2 and Uribe filed a motion to dismiss. (ECF No. 129). Also on February 1, 2016,  
3 Defendant Kuzil-Ruan filed a motion to dismiss. (ECF No. 131). Plaintiff filed an  
4 opposition to the motions to dismiss. (ECF No. 140). Defendants Giurbino and Uribe  
5 filed a reply. (ECF No. 132).

6 On July 22, 2016, United States Magistrate Judge Ruben B. Brooks issued the  
7 Report and Recommendation. (ECF No. 145). The Report and Recommendation  
8 recommends that the Court dismiss the First Amendment claims for damages and  
9 injunctive relief against all Defendants in their individual capacity based on qualified  
10 immunity; dismiss the RLUIPA claim for damages against all Defendants without leave  
11 to amend; dismiss the First and Amendment and RLUIPA claims for injunctive relief  
12 against all Defendants in their official capacity as moot with leave to amend.

13 On August 22, 2016, Plaintiff filed objections to the Report and  
14 Recommendation. (ECF No. 147). On August 31, 2016, Defendant Kuzil-Ruan filed  
15 a reply. (ECF No. 148). On September 2, 2016, Defendants Giurbino and Uribe filed  
16 a reply. (ECF No. 149).

## 17 **II. Discussion**

18 The duties of the district court in connection with a Report and Recommendation  
19 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72 and 28 U.S.C.  
20 § 636(b)(1). The district court must “make a de novo determination of those portions  
21 of the report . . . to which objection is made,” and “may accept, reject, or modify, in  
22 whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C.  
23 § 636(b)(1); *see also U.S. v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

### 24 **1. Claims Against Defendant Giurbino in his Individual Capacity**

25 Plaintiff contends that the Magistrate Judge erred in recommending that the  
26 claims against Defendant Giurbino in his individual capacity be dismissed. Plaintiff  
27 contends that the facts alleged in the TAC are sufficient to show that Defendant  
28 Giurbino “omitted to perform an act which he was legally required to do that caused the

1 deprivation of which [the] complaint is made.” (ECF No. 147 at 2).

2       The Court has reviewed the Report and Recommendation, the objections, and the  
3 submissions of the parties. The Court concludes that the Magistrate Judge correctly  
4 found that based on the allegations of the TAC, the Court cannot draw a reasonable  
5 inference that Defendant Giurbino was personally involved in any violation of  
6 Plaintiff’s constitutional rights. The Court concludes that the Magistrate Judge  
7 correctly concluded that Plaintiff failed to state individual capacity claims against  
8 Defendant Giurbino. All claims against Defendant Giurbino in his individual capacity  
9 is dismissed.

## 10       **2. Defendants’ Immunity from Monetary Damages**

11       Plaintiff contends that “as it concerns Defendants’ immunity from monetary  
12 damages, it is within the Court’s jurisdiction to guarantee that Rogers’ constitutional  
13 rights are not forbidden by direction of entered decree with the Defendants in order to  
14 guarantee any more unconstitutional behavior by CDCR.” (ECF No. 147 at 3).  
15 Plaintiff’s objections to the Report and Recommendation do not address the conclusion  
16 of the Magistrate Judge that claims for money damages against state officials sued in  
17 their official capacity are barred by the Eleventh Amendment.

18       The Court has reviewed the Report and Recommendation, the objections, and the  
19 submissions of the parties. The Court concludes that the Magistrate Judge correctly  
20 concluded that, under the Eleventh Amendment, Defendants are immune from claims  
21 for money damages against Defendants in their official capacity. All claims for money  
22 damages against Defendants in their official capacity are dismissed.

## 23       **3. RLUIPA Claims Against Defendants in Their Individual Capacity**

24       Plaintiff contends that he is seeking only injunctive relief under RLUIPA.  
25 However, in his objections to another section of the Report and Recommendation,  
26 Plaintiff contends that his claim for damages survives. *See* ECF No. 147 at 5.

27       The Court has reviewed the Report and Recommendation, the objections, and the  
28 submissions of the parties. The Court concludes that the Magistrate Judge correctly

1 concluded that claims for money damages against prison officials in their individual  
2 capacities under RLUIPA are not available. The RLUIPA claims against all Defendants  
3 in their individual capacities are dismissed with prejudice.

#### 4 **4. RLUIPA Claims for Injunctive Relief**

5 Claims under RLUIPA seeking money damages are not available against prison  
6 officials in their individual capacity. *Wood v. Yordy*, 753 F.3d 899, 904 (9th Cir. 2014).  
7 Plaintiff may not recover damages for claims under RLUIPA against Defendants in  
8 their official or individual capacity and may only seek equitable relief against  
9 Defendants in their official capacity. *See Gray v. Lewis*, Case No. 13-cv-04929-SI,  
10 2015 WL 3957865, at \* 4 (N.D. Cal. June 29, 2015). The Magistrate Judge concluded  
11 that Plaintiff's RLUIPA claim for injunctive relief is moot.

12 Plaintiff contends that the Magistrate Judge erred in determining that the claims  
13 for injunctive relief under RLUIPA are moot. Plaintiff contends that Defendants, each  
14 of whom have retired from the CDCR positions, should be substituted with the new  
15 officers in their positions. Plaintiff contends that his allegations are sufficient to show  
16 that the threat of injury will continue indefinitely.

17 The Court has reviewed the Report and Recommendation, the objections, and the  
18 submissions of the parties. The Court concludes that the Magistrate Judge correctly  
19 determined that it is "absolutely clear" that the alleged violation of Plaintiff's religious  
20 and constitutional rights at Centinela State Prison is "not reasonably [] expected to  
21 recur." *See Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) ("A case might  
22 become moot if subsequent events made it absolutely clear that the allegedly wrongful  
23 behavior could not reasonably be expected to recur.").

24 Plaintiff does not allege that any rolling lockdowns have occurred after 2011.  
25 Since filing this action, Plaintiff has been transferred from Centinela State Prison to  
26 California Men's Colony. Plaintiff's assertions that he will be transferred back to  
27 Centinela some time in the future are "too speculative to prevent mootness." *See Dilley*  
28 *v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995) ("Dilley has not demonstrated a reasonable

1 expectation that he will be transferred back to Calipatria and subjected again to law  
 2 library policies depriving him of meaningful access to the courts. . . . Dilley’s claim that  
 3 he might be transferred back to Calipatria some time in the future is ‘too speculative’  
 4 to prevent mootness.’). The Magistrate Judge’s determination that the claim for  
 5 injunctive relief is moot is supported by the authority Plaintiff cites in his objections.  
 6 *See Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985) (“The possibility that  
 7 [plaintiff] will be convicted and again sent to the maximum security unit at Soledad is  
 8 too speculative to rise to the level of reasonable expectation or demonstrated  
 9 probability, and as such cannot be the basis for a finding that the case continues to  
 10 present a justiciable question. . . . [W]here the complainant was no longer subject to the  
 11 allegedly illegal activity, the complaint for an injunction became moot.”).

12 The Court concludes that the Magistrate Judge correctly concluded that based on  
 13 the information presented to the Court, no exception to the mootness doctrine is  
 14 applicable. Plaintiff’s RLUIPA claims for injunctive relief against all Defendants are  
 15 dismissed as moot with leave to amend.

## 16 **5. Qualified Immunity**

17 The First Amendment claims for damages against Defendants in their official  
 18 capacity have been dismissed under the Eleventh Amendment. The Magistrate Judge  
 19 concluded that Defendants are entitled to qualified immunity on the First Amendment  
 20 claims against Defendants in their individual capacity.

### 21 **A. Staff Reduction Plan**

22 Plaintiff contends that the Defendants have not presented evidence that the Staff  
 23 Reduction Plan was implemented due to budget restrictions. Plaintiff contends that the  
 24 Staff Reduction Plan was implemented as a retaliatory measure toward inmates and  
 25 therefore the Staff Reduction Plan violated Plaintiff’s First Amendment rights.

26 The Court has reviewed the Report and Recommendation, the objections, and the  
 27 submissions of the parties. Plaintiff’s argument that the Staff Reduction Plan was  
 28 implemented for retaliation purposes, not budget restrictions, is made for the first time

1 in his objections to the Report and Recommendation. The Court concludes that the  
2 Magistrate Judge correctly determined that Defendants are entitled to qualified  
3 immunity for the alleged constitutional violations resulting from the rolling lockdowns  
4 that followed the implementation of the Staff Reduction Plan. The Court concludes that  
5 the Magistrate Judge correctly determined that Defendant Uribe is entitled to qualified  
6 immunity because he could reasonably rely on the constitutionality of the Staff  
7 Reduction Plan, the Plan does not appear to patently violate fundamental constitutional  
8 principles, and Defendant Uribe's conduct in enforcing the plan was not egregious. The  
9 Court concludes that the Magistrate Judge correctly determined that the facts alleged  
10 in the TAC are insufficient to show that Defendant Kuzil-Ruan violated Plaintiff's  
11 constitutional rights through the Staff Reduction Plan. The Court concludes that the  
12 Magistrate correctly determined that Defendants are entitled to qualified immunity on  
13 the implementation of the Staff Reduction Plan.

#### 14 **B. Three Lockdowns Between May and August 2010**

15 Plaintiff contends that the Magistrate Judge did not address the four *Turner*  
16 factors and that meaningful review of the factors demonstrates that Plaintiff's  
17 allegations plausibly suggest that he is entitled to relief. Plaintiff contends that  
18 Defendants' assertion that the lockdowns were related to security concerns "does not  
19 automatically give rise to a legitimate penological interest under *Turner*." (ECF No.  
20 147 at 9).

21 The Court has reviewed the Report and Recommendation, the objections, and the  
22 submissions of the parties. Plaintiff's arguments in his objections to the Report and  
23 Recommendation and criticism that the Magistrate Judge did not analyze the *Turner*  
24 factors go to whether Plaintiff has stated a claim for violation of the First Amendment.  
25 See *Turner v. Safley*, 482 U.S. 78 (1987). In this section of the Report and  
26 Recommendation, the Magistrate Judge was not addressing whether Plaintiff had stated  
27 a claim, but rather, whether Defendants were entitled to qualified immunity under the  
28 First Amendment. Under the qualified immunity analysis, the Court determines



1 whether the facts alleged show that the defendant violated a constitutional right and  
2 whether the right was clearly established at the time of the defendant's alleged conduct.  
3 *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The Court concludes that the  
4 Magistrate Judge correctly determined that it was not a clearly established violation of  
5 Plaintiff's constitutional rights to impose a seven-to-ten day prison lockdown after  
6 items that posed safety threats went missing. The Court concludes that the Magistrate  
7 correctly determined that Defendants are entitled to qualified immunity on the three  
8 lockdowns. The motions to dismiss Plaintiff's claims against Defendants for damages  
9 and injunctive relief in their individual capacity under the First Amendment are  
10 dismissed.

### 11 **III. Conclusion**

12 The Magistrate Judge correctly concluded that the RLUIPA claim could only be  
13 brought against Defendants in their official capacity for injunctive relief and that the  
14 RLUIPA claim for injunctive relief was moot. The Magistrate Judge correctly  
15 concluded that the First Amendment claims asserted against Defendants in their  
16 individual capacity are barred by qualified immunity. The Magistrate Judge correctly  
17 concluded that the First Amendment claims for damages against Defendants in their  
18 official capacity are barred by the Eleventh Amendment and the First Amendment claim  
19 for injunctive relief is moot.


20 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 145)  
21 is adopted in its entirety. The motion to dismiss (ECF No. 129) filed by Defendants  
22 Giurbino and Uribe is granted. The motion to dismiss (ECF No. 131) filed by  
23 Defendant Kuzil-Ruan is granted.

24 Plaintiff's First Amendment claims against all Defendants in their individual  
25 capacity are dismissed with prejudice based on qualified immunity. Plaintiff's RLUIPA  
26 claims for damages against all Defendants are dismissed with prejudice. Plaintiff's  
27 RLUIPA and First Amendment claims for injunctive relief against all Defendants in  
28 their official capacity are dismissed with leave to amend.



1 The Third Amended Complaint is dismissed. Plaintiff shall have sixty (60) days  
2 from the date this Order is filed to file a motion for leave to amend the complaint. If  
3 Plaintiff does not file a motion for leave to amend the complaint within sixty (60) days  
4 from the date this Order is filed, the Clerk of the Court shall close the case.

5 DATED: September 7, 2016

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7 **WILLIAM Q. HAYES**  
8 United States District Judge  
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